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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Y.H., Plaintiff and Appellant, v. I.H., Defendant and Respondent.	B286926 Los Angeles County Super. Ct. No. BF059166

APPEAL from an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Munger Tolles & Olson, J. Max Rosen, Joseph Lee; Public Counsel and Sara Van Hofwegen for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

INTRODUCTION

Y.H. appeals from an order denying his request to award I.H. custody of Y.H. and his related request for special immigrant juvenile status (SIJS) findings.[1] Y.H. contends the family court erred by not finding that I.H. was his presumed mother under Family Code[2] section 7611, subdivision (d), and by finding that I.H. is not Y.H.'s biological mother. To the extent we deem it necessary to our decision, Y.H. seeks consideration of newly acquired evidence on appeal. And because Y.H. is now an adult, he asks us to reverse the order and direct the court to enter the custody determination and SIJS findings as of October 24, 2017. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Y.H. was born in Honduras on October 25, 1999. In April 2017, he filed a petition to establish a parental relationship with I.H. Y.H. alleged that I.H. was his mother, and requested that she be awarded sole legal and physical custody. Because Y.H. was a minor when he filed the petition, the court appointed Marisol Ramirez, an attorney, as his guardian ad litem. In June 2017, Y.H. filed requests for an order awarding I.H. custody of him and for SIJS findings required by federal immigration law. Among other things, Y.H. sought a finding that his "alleged father, Luis," abandoned him before he was born. The petition and requests

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[1] Because this appeal arises out of a parentage action and a request for SIJS findings, we refer to the parties by their initials. (See Fam. Code, § 7643; Code Civ. Proc., § 155, subd. (c).)

[2] All undesignated statutory references are to the Family Code unless otherwise indicated.

were filed by Y.H.'s trial counsel, Stephanie Delgado. I.H. did not respond to the petition or the requests for custody and SIJS findings.

On July 31 2017, the court denied Y.H.'s petition and requests because his father was not named or served in the parentage action. Y.H. challenged the court's ruling through a petition for writ of mandate filed in this court in late September 2017. On October 4, 2017, we issued a notice of intent to grant a peremptory writ in the first instance under *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171. Our notice invited the court to reconsider its July 2017 order by scheduling a hearing before October 25, 2017, to reach the merits of Y.H.'s requests. We declined, however, to express an opinion on the merits of those requests. The court subsequently informed us that it had vacated its order and scheduled a hearing for October 23, 2017. We therefore dismissed the petition for writ of mandate as moot.

On October 23, 2017, the court conducted an evidentiary hearing on Y.H.'s requests. Y.H. was represented by counsel at that hearing. After providing the court with a summary of the requested relief, counsel stated that Y.H. would rely solely on his May 22, 2017, declaration in support of his request for sole legal and physical custody to I.H. When the court asked whether Y.H. intended to introduce his birth certificate as evidence, counsel responded that I.H. had a copy of the document at home. Y.H.'s counsel then requested and received permission to call I.H. as a witness at the hearing.

I.H. testified that she gave birth to Y.H. on October 25, 1999 in Honduras at "the General Hospital" in "Progreso Yoro, a City of Yoro in Progreso." Although she gave birth to Y.H. in a

hospital, no one else was present at Y.H.'s birth. Luis is Y.H.'s father but I.H. does not know Luis's last name.

Towards the end of I.H.'s brief testimony, the court asked Y.H.'s counsel if it could ask I.H. questions regarding Y.H.'s father. Counsel agreed.[3] In response to the court's questions, I.H. testified she first met Luis at the Platinio nightclub in Guatemala City, Guatemala. After meeting Luis about two times a month over six months, I.H. had a sexual encounter with him on one occasion. Luis worked as a cashier at Bank of America in Guatemala City. I.H. saw Luis two or three years after giving birth to Y.H. while she was working at a different nightclub in Guatemala City.

I.H. lived and worked in Guatemala but gave birth in a different country "because [she is] from Honduras." Although her testimony was not clear, I.H. testified that she lived in Guatemala until she left for the United States 11 years ago. The grandmother of I.H.'s other children took care of Y.H. in Puerto Varrios Isabal, Guatemala. I.H. was "22, 20 something" when she got pregnant or gave birth. At the conclusion of I.H.'s testimony, the court stated it would like to review Y.H.'s birth certificate and gave him until the following day, October 24th, to submit the

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[3] In his recitation of the procedural history of the case, Y.H. faults the court for turning the hearing into "an interrogation," and by asking I.H. "improper" and "increasingly intrusive questions." But, under California Rules of Court, rule 5.113(g), a family court judge may elicit testimony by directing questions to the parties and other witnesses whenever the court receives live testimony. (See also Evid. Code, § 775; *In re S.C.* (2006) 138 Cal.App.4th 396, 423 ["It is well within the province of the judge to ask a witness questions, particularly when the judge is the fact finder."].) In any event, Y.H. forfeited this issue by not objecting to the court's questions. (Evid. Code, § 353, subd. (a).)

original or certified copy of the certificate. Y.H. agreed to the court's request and submitted a copy of his birth certificate the afternoon of October 23.[4]

Although I.H. testified she gave birth to Y.H. in Progreso Yoro in the Department of Yoro, Honduras, Y.H.'s birth certificate states he was born in San Pedro Sula in the Department of Cortes, Honduras. Noting the discrepancy, and "wanting to give [Y.H.] every opportunity to explain, [the court] caused a conference call to be placed to [Y.H.'s] counsel on October 24, but counsel had no explanation other than possible mistake, and gave no indication that they had ever discussed the discrepancy or its explanation with [I.H.]."

On October 24, 2017, the court issued a written order denying Y.H.'s petition and requests. The court held that Y.H. had not shown by a preponderance of the evidence that I.H. "is his natural mother and/or that 'Luis' is his natural father." The court noted that "[i]n its observations in open court during the hearing, [it] had the opportunity to appraise the credibility of [I.H.] and found it to be wanting." The court explained that I.H.'s testimony about Y.H.'s place of birth was contradicted by the birth certificate, and counsel made no effort at the hearing or the

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[4] The record on appeal does not contain a copy of the birth certificate submitted to the court on October 23. The record only contains a copy of the birth certificate filed on October 24. For purposes of this appeal, we presume the October 24 birth certificate is the same certificate submitted to and reviewed by the court before the challenged order was entered. (See *Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 179 [if an appellant fails to provide any parts of the record that could support the court's judgment, it will be presumed that those parts of the record support the judgment].)

following day to explain the discrepancy. The court was also troubled about discrepancies between I.H.'s October 2017 testimony and statements attributed to her in July 2017 concerning her interactions with Luis. For example, in July 2017 I.H. stated she encountered Luis a total of two times but she testified in October 2017 that she saw him about twice a month over a six-month period. Although the court pointed out those discrepancies during the hearing, Y.H.'s counsel "rested without calling, or requesting time to call … any other witness."

This appeal followed.

CONTENTIONS

Y.H. contends the court erred by not finding that I.H. was his presumed mother under section 7611, and by finding that I.H. is not Y.H.'s biological mother. To the extent we deem it necessary to our decision, Y.H. seeks consideration of newly acquired evidence on appeal.

DISCUSSION

1. Applicable Law and Standard of Review

Y.H. initiated this action under the Uniform Parentage Act (UPA) (§ 7600 et seq.), the statutory framework governing judicial determinations of "the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." (§ 7601, subd. (b).) In any parentage action under the UPA, there may be multiple parties involved, including the child and his or her "natural," "presumed," and "alleged" parents. (§§ 7601, 7610, 7611, 7635.) The term "natural" parent refers to an individual whose status as a nonadoptive

parent is recognized under the UPA (§ 7601, subd. (a)); that status may be established by proof that the parent gave birth to the child. (*Ibid.*) An individual is a "presumed" parent if, for example, the individual accepted the child into his or her home and held the child out as a natural child. (§ 7611, subd. (d).)

Code of Civil Procedure section 155 (section 155), subdivision (a)(1) confers jurisdiction on the superior courts of California to make factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile. Section 155 requires the superior court on request to issue an order including the necessary findings regarding SIJS if "there is evidence to support those findings, which may consist solely of, but is not limited to, a declaration by the child who is the subject of the petition[.]" (§ 155, subd. (b)(1).)

We independently review questions of law, including the construction and application of a statute. (See *Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 370, disapproved on another point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532.) We review a trial court's factual findings for substantial evidence. (*Charisma R.*, at pp. 368–369.) When determining whether substantial evidence is present, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or determine where the preponderance of the evidence lies. (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) So long as the trier of fact does not act arbitrarily and has a rational ground for doing so, it may reject the testimony of a witness even though the witness is uncontradicted. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 461.) "Consequently, the testimony of a witness which has been rejected by the trier of fact cannot be credited on appeal unless,

in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.)

2. The record on appeal is incomplete.

In its October 24, 2017, order, the court expressly referenced an October 13, 2017, declaration filed by Jessica Ruvalcaba and statements made by Y.H.'s counsel during an October 24, 2017, telephone conference. Here, Y.H. has chosen to perfect his appeal by providing us with his own appendix in lieu of a clerk's transcript. The appendix, however, does not contain Ruvalcaba's October 13, 2017, declaration or a reporter's transcript or suitable substitute of the October 24, 2017, telephone conference with Y.H.'s counsel.

Appealed judgments and orders are presumed correct, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Consequently, an appellant has the burden of providing an adequate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Id*. at pp. 1295–1296.) Without Ruvalcaba's October 13, 2017, declaration and a record of the October 24, 2017, telephone conference with Y.H.'s counsel, we could conclude that Y.H. failed to meet his burden to demonstrate error and affirm the order. Nevertheless, given the importance of the issues raised by Y.H., we address the merits on the record before us.

3. I.H.'s Parentage

Under section 155, the court was required to make SIJS findings if it found that Y.H. was in the custody of an individual

or entity appointed by the court; cannot reunify with one or both parents due to abuse, neglect, abandonment; and it is not in his best interest to return to his home country or the home country of his parents. (*Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1013.) Because the court determined that I.H. was not Y.H.'s natural mother, it did not award her custody of Y.H. And without a custody order, Y.H. could not obtain the first finding needed for SIJS.

Y.H. argues the court applied an incorrect legal standard by finding that I.H. is not Y.H.'s biological mother under the UPA. (See § 7610 [parent-child relationship may be established by proof of mother having given birth to the child].) Instead, Y.H. contends the court should have found that I.H. was his presumed mother under section 7611, subdivision (d) because she received Y.H. into her home and held him out as her natural child.

But Y.H. has not pointed to anything in the record indicating that he asked the court to make a presumed parent finding under section 7611. In fact, as reflected by the hearing testimony, the focus of the family law proceeding was on whether I.H. gave birth to Y.H., thereby establishing the parent-child relationship under section 7610, subdivision (a) of the UPA. Biological parenthood is governed by different standards than presumed parenthood, and we do not construe a request for a parentage determination based on having given birth to a child as one based on presumed motherhood. (See *R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 774.) In short, "[w]e see no reason to deviate from the usual rule that when a [party] does not raise an issue in the trial court, he or she is precluded from raising the issue on appeal. (Citation.) That is particularly true when, as here, the issue requires a finding of fact." (*In re Joshua G.* (2005)

129 Cal.App.4th 189, 197.) Further, we are aware of no authority holding that a family court judge has the sua sponte duty to make a presumed parent finding or, put another way, that a person in Y.H.'s position has no duty to expressly raise the issue before the lower court. Having failed to raise the issue below, Y.H. has forfeited the claim that I.H. was his presumed mother under the UPA.

Certainly, we acknowledge there is evidence in the record that could support a finding that I.H. was Y.H.'s presumed mother. And the court stated in its October 2017 order that Y.H. lived with I.H. for considerable periods of time and referred to her as his mother. But Y.H. did not request a statement of decision, or seek correction or clarification of the court's order. The effect of this is that we must presume that Y.H. did not request a finding that I.H. was his presumed mother. (See *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 62.)

We also reject the contention that the court improperly imposed on Y.H. a heightened burden of proof to show I.H was his biological mother, or that the court's findings were not supported by substantial evidence.

First, the court fully articulated the applicable burden of proof, proof by a preponderance of the evidence, before concluding Y.H. had not met his burden. The court's passing references in its three-page ruling that the proceedings were not adversarial are accurate statements and have been taken out of context by Y.H. The non-adversarial nature of the proceedings—i.e., the lack of objection by Y.H.'s father to an award of custody to I.H.—was relevant for determining what evidence the court needed before it made a custody order. When, as in this case, one of the parents has not appeared in the proceedings, "the court shall require" the

appearing parent to submit a certified copy of the child's birth certificate to the court. (§ 3140.) Further, a fair reading of the entire record does not support Y.H.'s contention that the court "would scrutinize [I.H.'s] testimony with extra care, because she might have an 'ulterior motive' to lie in order to help [Y.H.] receive SIJ Findings." In fact, "wanting to give [Y.H.] every opportunity to explain" discrepancies in I.H.'s hearing testimony, the court initiated a conference call with Y.H.'s counsel *after* the hearing was completed.

Second, issues of fact and credibility are questions for the family court, not this court. *(In re Tania S.* (1992) 5 Cal.App.4th 728, 733.) In this case, the court found Y.H. had not met his burden after determining, among other things, that I.H.'s testimony about where she gave birth was contradicted by Y.H.'s birth certificate.[5]

On this record, the court, as the trier of fact, did not act arbitrarily and substantial evidence supports its ruling.

4. New Evidence on Appeal

Finally, Y.H. contends we should consider newly acquired DNA evidence under Code of Civil Procedure section 909 (section 909) that purports to confirm I.H. is Y.H.'s biological mother. Based on this evidence, obtained by counsel in July 2018, Y.H. urges reversal of the court's October 2017 order.

"The power to invoke [section 909] should be exercised sparingly, ordinarily only in order to affirm the lower court decision and terminate the litigation, and in very rare cases

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[5] According to his April 10, 2017, declaration, Y.H. was born in San Pedro Sula, Honduras, the same place listed in his birth certificate.

where the record or new evidence compels a reversal with directions to enter judgment for the appellant." (*Monsan Homes, Inc. v. Pogrebneak* (1989) 210 Cal.App.3d 826, 830.) The procedure under this statute is not a substitute for a motion for a new trial based on newly discovered evidence. (*Id.*; see also *Estate of Schluttig* (1950) 36 Cal.2d 416, 422, 425.)

Y.H. was represented by counsel throughout the family court proceeding. Nevertheless, he did not file a new trial motion, or seek reconsideration of the court's October 2017 order, based on new or additional evidence concerning I.H.'s parentage. And Y.H. does not explain on appeal why he failed to do so.[6] We decline to take new evidence on appeal or reverse the court's order based on this evidence.

[6] Although Y.H. turned 18 the day after the hearing, he contends family courts have jurisdiction to make custody orders and SIJS findings even after children become adults.

DISPOSITION

The order is affirmed. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.